

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

ACE MASONRY, d/b/a ACE UNLIMITED and
BELLA MASONRY, LLC, alter egos and
BELLA FURNITURE SOLUTIONS, INC., and
HENRY BELLAVIGNA, LISA BELLAVIGNA,
ROBERT P. BELLAVIGNA AND
DOMENICK BELLAVIGNA, Individuals

and

INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS, LOCAL NO. 3

and

LABORERS INTERNATIONAL UNION, LOCAL NO. 785

and

NORTHEAST REGIONAL COUNCIL OF CARPENTERS

CASES

03-CA-073540

03-CA-074523

03-CA-073549

03-CA-074531

03-CA-079606

BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION IN THE MATTER OF

ACE MASONRY, INC. D/B/A ACE UNLIMITED, BELLA MASONRY LLC, BELLA
FURNITURE SOLUTIONS, INC., HENRY BELLAVIGNA, LISA BELLAVIGNA, ROBERT
P. BELLAVIGNA and DOMENICK BELLAVIGNA

The Honorable Raymond P. Green recently issued a decision in the above matter. Robert P. Bellavigna and Lisa Bellavigna take exception to a number of the finding of the Court.

Robert P. Bellavigna:

The Judge determined that Robert P. Bellavigna (“Bob”) concluded that actively participated in the diversion of Ace’s corporate funds and is personally liable. (Pg 13, lns 8-12).

In reaching that conclusion the Judge apparently relied upon a few facts. Bob was entitled to write checks on Ace's Account, utilized Ace's credit cards, owned real property with his wife, Lisa Bellavigna ("Lisa"), was listed as a joint owner on bank accounts with Lisa and deposited a total of \$13,000.00 in his personal bank account (Pg 6, lns 7-15 & Pg 7, lns 49-50). Bob does not dispute any of those facts. However, a valid explanation was offered for each.

There were only two instances where Bob had any involvement with Ace's financial matters. Bob had to personally guaranty a loan to Ace. However, as explained by Mr. Steve Bacon in 2012 the bank required that Lisa personally guaranty the loan to Ace. Since Lisa's assets were held jointly with Bob as her husband, it was the bank's policy to have the spouse also personally guaranty the loan. (2012 R. 1753-54). If Bob did not agree to sign then Lisa and Ace would not have been able to obtain the necessary financing.

The only other instance where Bob was involved with Ace's financial matters was in the fall of 2011. (R. 349). During that time Lisa became ill and was unable to attend to the daily requirements of the company. As a result, several people were forced to pick up the slack and take on extra duties. (R. 349-351). Bob, for a brief period of time, worked with Ace's controller to make sure suppliers and subcontractors were paid. (R. 349-351). Once Lisa returned, Bob no longer had any role with Ace's finances or debts.

While Bob did have access to an Ace credit card so did a number of other Ace employees and those other employee used the cards on a regular basis. (R. 343-347 & Ex. GC-3). Additionally, it must be noted that the General Counsel could only point to a handful of expenses that were not construction related purchases. In each instance Bob was able to explain each purchase and how it related to Ace. Bob explained that Ace took some of its employees are marketing trips and in one instance purchased a set of golf clubs for an employee that did not

have any clubs. Bob also explained that Ace held company parties and that he would purchase gifts to be given away at these company parties. (910-912). Additionally, if you add up all of the purchases that Petitioners assert as irregular it amounts to no more than a few thousand dollars.

Is it really noteworthy that a husband and wife, such as Bob and Lisa own real property jointly? Similarly, is it noteworthy that Bob and Lisa held joint accounts together? The Court's decision seems to rely heavily on the nature and quantity of withdrawals from Ace's accounts and deposits in to Lisa and Bob's joint accounts. If the records are examined closely it is clear that Bob did not withdraw any of the money in question from Ace's accounts. It is equally clear that Bob did not deposit any of the money in the jointly held accounts. These withdrawals and deposits were all made by Lisa. This was nothing more than a passive receipt of funds. A person's passive receipt of benefits that derive from a diversion of corporate assets for noncorporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the *White Oak* analysis. See Smith Barney, Inc. v. Strangie, 192 F.3d 192 (1st Cir. 1999) (finding wife who may have personally benefited from husband's diversion of corporate assets for noncorporate purposes not individually liable); Firstmark Capital Corp. v. Hempel Financial Corp., 859 F.2d 92, 95 (9th Cir. 1988) (finding wife who personally benefited from husband's diversion of corporate assets for noncorporate purposes not individually liable).

Lastly, the Court bases part of its conclusion that Bob is personally liable on the fact that he deposited \$13,000.00 in to his own account. (Pg 7, ln 49-50). Bob explained where the money originated from. He routinely buys and sells equipment. Typically people buy and sell equipment using cash and that any large deposits in his account would be from those activities.

There is no proof that Bob diverted funds from Ace. There is no proof that Bob retained any of Ace's. In fact, the bank seized Ace's assets and sold many of them to Bella. (2012 R. 1179 & 2012 Ex. Resp. 13). There is no proof that Bob received any loans from either company.

Lisa Bellavigna:

The Acting General Counsel spent a significant amount of time questioning Lisa regarding a series of financial transactions. Lisa testified that she withdrew the funds because they were trust funds and she needed to protect them for the benefit of the trust beneficiaries (R. 117, 202, 250-251, 307-317, 1097-1098). Lisa identified at least one trust beneficiary, E.I. Johnson and testified that Ace owed that trust beneficiary at least \$150,000.00. (R. 1097-1098). So in an attempt to protect the trust beneficiary Lisa withdrew the money from the account.

The Court has misinterpreted the law with respect to trust fund beneficiaries. The Court concludes that the Lien Law treats wage supplements owed to employees on the same level as subcontractors and suppliers. (Pg 5, lns 1- 16). The Court is correct in its conclusion. However, there is a major distinction that was missed. The Lien Law creates a separate trust for each project. Trust assets may not be used for nontrust purposes, which is any purpose outside the scope of the cost of the improvement of real property/construction **project in question**. Aspro Mech. Contr. v. Fleet Bank, 1 N.Y.3d 324, 328, (2004). For example, use of trust assets to pay corporate administrative expenses/overhead or officer salaries or union benefits not related to work subject to the contract is not allowed since these are nontrust purposes which are not included in the Lien Law § 71(2) list of approved trust fund expenditures. See, Schwadron v. Freund, 329 N.Y.S.2d 945 (Sup. Ct., Rockland Cty., 1972). So Ace and/or Lisa could not use trust funds from one particular project to pay the debts or even the trust beneficiaries of another


project. If you did then you would be diverting trust assets from one beneficiary to benefit a trust beneficiary on a separate project. You cannot “rob Peter to pay Paul”.

A diversion of trust assets also subjects the involved parties to criminal sanctions. NY Lien Law Section 79-a. The failure to use trust money to pay trust fund beneficiaries could lead to civil and criminal liability for Ace and Lisa. As such, Lisa had an obligation to make sure that no other entity or person encumbered that money before it could be paid to any rightful trust fund beneficiary.

Conclusion

For the forgoing reasons, the Court should revise its findings and conclusions.

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